IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN and GEORGIA HUBER, husband and wife, Appellants, v. ANN C. SOUTHARD and JOHN DOE SOUTHARD, husband and wife, Respondents.	No. 37356-4-II ORDER AMENDING OPINION

The respondent has filed a motion for reconsideration in the above-entitled matter. After reviewing the motion, the opinion is hereby amended as follows:

On page 7 of the slip opinion, following the quotation ending with " . . . Miss Southard would be justified in removing 500 yards of soil from [the Hubers'] property." the following footnote is inserted:

> Southard objected to this statement, arguing "there has been no testimony of 500 yards." Report of Proceedings (RP) at 117-18. The trial court responded that [t]here was testimony from Mr. Strong that he believes approximately 500 yards were removed." RP at 118. Southard queried, "From Lot 21?" The trial court clarified, stating, "Well, from the site of the excavation." RP at 118.

On page 13 of the slip opinion, first full paragraph, "from the Hubers' lot" is removed and replaced with "from the excavation site."

On page 13 of the slip opinion, the last line, "approximately 500 square yards of the Hubers' soil" is removed and replaced with "an area approximately 200 feet long and 20 feet wide from the Hubers' lot."

SO ORDERED.

DATED: this _____ day of _____, 2009.

Van Deren, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN and GEORGIA HUBER, husband and wife, Appellants, v. ANN C. SOUTHARD and JOHN DOE SOUTHARD, husband and wife, Respondents.	No. 37356-4-II UNPUBLISHED OPINION

Van Deren, C.J. — John and Georgia Huber appeal the trial court's decision determining that Ann Southard did not trespass on their land when she built a new driveway and encroached 20 feet onto their property. They argue that Southard did not possess an easement over their property for purposes of ingress and egress. Alternatively, they argue that Southard exceeded the scope of any ingress and egress easement by excavating 500 cubic yards of land from a bank on the Hubers' property. The Hubers additionally argue that the trial court improperly excluded their damages expert's testimony and that it improperly calculated damages. We reverse and remand for calculation of damages to the Hubers after additional proceedings related to those damages, as well as for reconsideration of additional attorney fees to the Hubers based on Southard's trespass.

FACTS

In late 1995 or early 1996, the Hubers purchased lot 21 in the Hillmont Terrace subdivision, located in Montesano, Grays Harbor County. The Hubers reside in Olympia, Washington and lot 21 remains undeveloped. Southard purchased adjoining lot 22 in 2002.

Originally, G.R. and Patricia Stephenson and Charles W. and Linda Caldwell jointly owned lots 21 and 22. The Stephensons and Caldwells apparently retained ownership of lot 21 until 1987, when they conveyed lot 21 to Earl and Mary Ann Kiel. Earl Kiel conveyed lot 21, as separate property, to the Hubers in late 1995 or early 1996.[1]

In 1978, the Stephensons and Caldwells conveyed lot 22 to the McClellands. In 1991, the McClellands conveyed lot 22 to the Kennedys. In 1998, the Kennedys conveyed lot 22 to Russell Peterson. In 2002, Federal National Mortgage Association apparently acquired lot 22 from First American Title Insurance Company. Southard likely purchased lot 22 from Federal National Mortgage Association in 2002 but we cannot confirm the circumstances of her purchase because her deed is not in the appellate record.

Kiel's deed to the Hubers contains the following language, "Subject to: covenants, conditions and restrictions of record; Also, rights of the public to make all necessary slopes; unrecorded easement rights for ingress and egress to the adjacent owners at Lot 20 and 22."

[1] The Hubers' deed is dated December 29, 1995, but Mr. Huber testified that they did not purchase the property until January 1996. The Hubers both testified that they purchased the property from someone named "Mike" but the deed lists Earl O. Kiel as the grantor and is signed by Kiel. The name "Mike Price" is crossed out in two places on the deed, however, indicating that Kiel may have originally intended to convey the property to Price before ultimately conveying the property to the Hubers.

Exhibit (Ex.) 2. The deed contains no description of the location or scope of the easement for ingress and egress. But owners of lot 22 have used a small pie-shaped portion of Lot 21 as part of the opening to lot 22's driveway, apparently dating back to the sale of lot 21 to the Kiels.

In February 2005, the Hubers discovered that Southard had excavated a portion of the hillside on the southwest side of lot 21, their lot. Before the excavation, Southard's backyard on the northeast side of her property "was a hill." Report of Proceedings (RP) at 109. Southard had cut into the hill behind her house to create a less-steep grade. In excavating, Southard "put in a flat back yard, and a flat space for the driveway." RP at 109. She removed a portion of the Hubers' property measuring approximately 20 to 26 feet wide and 200 feet long in this process. Southard also installed a garage on her property behind her house.

The Hubers sued Southard for trespass on July 24, 2006. At trial, the Hubers testified that Southard "dug into the bank so far . . . [she] actually just ruined any access of us ever building anything up there." RP at 6. The Hubers admitted during their testimony that the driveway on lot 22 "encroached on [their] property . . . it always has" and that the ingress/egress easement was "on the face of [their] deed." RP at 16. The Hubers both testified that they believed they also had an easement allowing use of lot 22's driveway and that the excavation restricted their ability to access their property from the driveway. There is no evidence of an easement burdening lot 22 in the record.

David Strong, a licensed engineering geologist, testified as an expert witness for the Hubers. Strong conducted a site visit in January 2006. "I went out. I was given a site plan, shown the survey and the approximate top of present slope and a general plat of the area. And I

went out and conducted visual observations and measurements." RP at 29. He testified that Southard's excavation created a 50 degree slope, more than the 45 degrees the building code allows,[2] and that "the top of the slope . . . extended onto Lot 21." RP at 30. Strong estimated that Southard had removed "in excess of five hundred yards" of fill from the slope. RP at 33.

Strong observed evidence of a past mud slide against the side of Southard's garage. "There is an actual line you can see where the top of the mud was against [the garage]." The mud had been removed but a "mud line" remained on the garage, approximately five to six feet above the ground. RP at 31. Strong estimated that earth from lot 21 was at least a "contributing factor" in the mud slide. RP at 35.

Strong also noted that "[t]here w[ere] no efforts to stabilize [the slope]" and predicted that the slope is "subject . . . to more erosion." RP at 32. He predicted that "over time [the angle would] erode . . . back to . . . 1 to 1."[3] RP at 44. Strong recommended two methods for stabilizing the slope, "[O]ne is put the dirt back, regrade it back to what existed prior to this work. . . . [T]he other would be to construct retaining walls to the design so that you are restoring the property back to where it was on Lot 21 before the grading started."[4] RP at 33. He

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[2] Strong testified that there are a "number [of] code issues" when "dig[ging] into a bank such as this without some engineering expertise." He also stated that the uniform building code and the international building code limit the cut of slopes to two to one but "it's a steep slope. The code will allow you to go to a one to one or 45 degrees, but that requires engineering." RP at 32. Strong did not elaborate on what he meant by "engineering."

[3] There is no definition of a 1 to 1 angle in the transcript, although Strong testified that a 2 to 1 slope is 26 degrees, making the 50 degree, or 1 to 1, slope created by Southard's excavation approximately twice as steep as a 2 to 1 slope.

[4] Strong also suggested that Southard could purchase lot 21 "and then the issue goes away." RP at 33.

estimated that replacing the dirt would cost approximately $20,000 and building a retaining wall would cost approximately $100,000. He stated that engineers would be "the people to ask" about the cost of stabilizing the slope. RP at 41.

Ryan Moore, a civil engineer, also testified as an expert for the Hubers. Moore visited the site of the excavation to estimate the cost of repairing the bank. He did not have a copy of the survey when he visited the site and he testified that he could not determine the boundary line without a survey. Moore testified that estimating repair costs without a copy of the survey was "professionally accepted in engineering circles." RP at 72. But he stated that he did not know "which property [the repairs are] on." RP at 75. "The estimates that I provided were not based on the property lines." RP at 73.

Following Moore's testimony, Southard objected to Moore's estimates of the repair costs resulting from Southard's excavation based on lack of foundation and because Moore could not specify what portion of the repairs would be on lot 21. The trial court stated, "The rule for establishing damages of this nature requires showing that the cost of the remediation is reasonable, and also that the remediation is necessary to repair damage that occurred to the property of the plaintiffs." RP at 74-75. When the Hubers attempted to admit Moore's written damage estimates into evidence, Southard conducted voir dire and Moore stated that his estimates "are based on fixing a problem with a hillside . . . [b]ut [he did not] know whose hillside it [wa]s." RP at 79. The trial court sustained Southard's objections and declined to admit Moore's damage estimates.

Southard testified that, when she purchased lot 22, the driveway was made of "not very

well put in black top. It looked sort of homemade [and] was very steep in slope." RP at 82. According to Southard, all of the developed lots in Hillmont Terrace have "aprons" at the mouth of their driveways, fanning out on both sides. Southard testified that the "11 foot encroachment [sic] at the end of the driveway . . . was put in there initially by Caldwell/Stevenson." RP at 84.

When she purchased lot 22, Southard did not know that the pie-shaped portion of her driveway, at the apron, was shared with lot 21. She stated, "I thought it was mine." RP at 84. Southard admitted that "there was excavation onto Lot 21" but she stated that the new driveway itself "does not encroach any more onto Lot 21 than it did before." RP at 86. After excavating and installing the new driveway, Southard installed a wood retaining wall and shrubbery along the driveway "for decorative use." RP at 89.

To determine the boundary lines of her property before the excavation, Southard "walked the back line and stepped it off." RP at 96. She stated, "[I]f you go to the back property line, there [are] a whole bunch of pink marker slips. I walked it off several times to make sure I got the right spot." RP at 97. But it was Southard herself who placed the pink ribbons on what she believed to be the edge of the property. Southard then used the edge of the pie-shaped portion of the driveway—which she believed belonged to her—to determine her boundary line. When asked whether it was her "intention to be trespassing or excavating the neighbor's property," Southard stated that she had "[n]o idea that was going on to the[ir] property." RP at 87. "That's where I made my mistake in cutting into their property because I thought it was mine, that's where the driveway was at when I bought the house." RP at 97.

During closing arguments, the Hubers' counsel admitted that "the amount [of] the

damages at this point are somewhat speculative" because Moore was not able to testify fully but he suggested that "if the Court finds that there was a trespass . . . the Court could reserve the issue of damages, and we could have a hearing solely on damages." RP at 115. The Hubers' counsel also stated that he believed "the issue of the easements is a red herring. I don't think that under any easement theory that Miss Southard would be justified in removing 500 yards of soil from [the Hubers'] property." RP at 117.

Southard's counsel admitted during closing argument that "[t]here in fact has apparently been a trespass here" but he argued that it was a legal trespass due to the easement for ingress and egress. He stated that Southard "didn't excavate to build a [garage]. She didn't excavate to put in a peony patch. She excavated to put in a driveway. And the driveway is ingress and egress onto her property." RP at 120-21. Southard's counsel objected to the Hubers' suggestion that the trial court bifurcate the damages issue, stating, "[W]e should not be splitting this trial. We were here. We were prepared. We had witnesses to testify. If their case failed, their case failed." RP at 127.

The trial court found that the Hubers' deed created an easement for the benefit of Southard's lot. It found that the Hubers did not possess an easement burdening lot 22. Further, the trial court found that "the excavation that was done was for the purpose of improving [Southard's] access to her property, that is, her ingress and egress," and, "to the extent the . . . excavation extended on to Lot 21, that it did not do so unreasonably." RP at 140.

In finding that the excavation was reasonable, the trial court stated that "the excavations w[ere] necessary to create a reasonable ingress and egress." The trial court further found that the

excavation had not caused damage to lot 21, in that "there ha[ve] been two winters . . . including one of the most severe storms that any of us have ever experienced in our lifetimes a few weeks ago, and I have not been presented any evidence . . . to show there . . . has been any erosion or wasting of soil off the cut bank." RP at 140-41. Finally, the trial court found that the decorative wall and shrubbery were "an unreasonable use of the easement rights," and ordered that Southard remove them from lot 21. RP at 143.

The trial court stated that it would have bifurcated the issue of damages "if [it] believed that th[e] soil removal . . . was an unreasonable use of the easement rights." RP at 143. Because it found otherwise, the trial court denied the Hubers' request for bifurcation of the trial on the issue of damages.

The Hubers requested attorney fees as the prevailing party because the trial court found that Southard trespassed in erecting the decorative wall and shrubbery. The trial court awarded the Hubers $440 in statutory attorney fees. The Hubers appeal.

We agree with the Hubers that Southard exceeded the scope of the easement and, in doing so, she committed trespass on lot 21. We reverse the trial court's decision and remand for further testimony regarding damages.

ANALYSIS

The Hubers first argue that the trial court erred in finding that an easement for ingress and egress benefitting lot 22 existed on their property.[5] In the alternative, they argue that Southard

[5] The Hubers argue that if any easement exists, it is a prescriptive easement and not an express easement. But the Hubers argue that Southard failed to show any prescriptive easement beyond the pie-shaped portion of the driveway. They, therefore, argue that Southard exceeded the scope of the prescriptive easement by excavating beyond the pie-shaped portion.

exceeded the scope of that easement. They also argue that the trial court "[a]ward[ed] [i]nadequate [d]amages" and that it abused its discretion in limiting Moore's damages testimony. Br. of Appellants at 22 (emphasis omitted).

I. Existence and Scope of Easement

A. Existence of an Easement Is Not an Issue on Appeal

The Hubers argue that no easement existed in favor of lot 22, either expressly or by prescription. But Southard correctly argues that the Hubers raise the issue of the easement's existence for the first time on appeal. RAP 2.5(a). Indeed, at trial, the Hubers both conceded that an easement existed in testifying that they believed the easement benefitted both lots, "The easement gives both of us the right to come and go on the property." RP at 18. Further, Mr. Huber admitted during his testimony that the driveway has always encroached on lot 21 and that "that was on the face of [the Hubers'] deed, [it] specifically said that lots on either side . . . have an easement across [the Hubers'] property." RP at 16. Therefore, we need not consider whether an easement existed and only consider whether the trial court properly interpreted the scope of the easement and whether Southard's intrusion into lot 21 exceeded its reasonable scope.[6]

B. Scope of the Ingress/Egress Easement

The Hubers argue that "[t]he trial court erred in holding that the portion of the excavation which encroached onto the Hubers' property" was within the scope of the ingress/egress or any prescriptive easement. Br. of Appellants at 20. Southard argues that the trial court properly

[6] It is likely an easement was not legally created in this case. First, the deed in which the alleged easement exists does not contain a clear expression of intent to create an easement. Rather, it is more likely the deed is referring to an outside document, the "unrecorded easement." Ex. 2. Second, the deed was between Kiel and the Hubers; there is no evidence that Southard's predecessors in interest knew of the easement or gave consideration in exchange for the easement. And easements "cannot create rights in strangers to the instrument." *Pitman v. Sweeney*, 34 Wn. App. 321, 323, 661 P.2d 153 (1983). Finally, Southard admitted during trial that she did not know that an easement existed burdening lot 21 when she conducted the excavation, indicating that no easement right was ever conveyed to her or to her predecessors in interest. But the Hubers' admissions at trial are fatal to their claim of lack of an easement in this case.

concluded that the excavation was a reasonable use of her ingress/egress easement over the Hubers' property.[7]

1. Standard of Review

Interpreting an easement is a mixed question of law and fact. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). The easement's scope is determined by looking to "the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied." *Logan v. Brodrick*, 29 Wn. App. 796, 799, 631 P.2d 429 (1981). "What the original parties intended is a question of fact and the legal consequence of that intent is a question of law." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

2. Reasonable Use of Easements

While we will construe an easement to accommodate the reasonable use of the dominant estate, "the owner of the dominant estate [(Southard)] can make no larger use of his easement or change its character in any way so as to increase the burden on the servient estate [(Hubers)]." *Little-Wetsel Co. v. Lincoln*, 101 Wash. 435, 445, 172 P. 746 (1918). The servient owner has the burden of proving misuse of the easement. *Logan*, 29 Wn. App. at 800.

> It can be assumed the parties had in mind the natural development of the dominant estate. Accordingly, the degree of use may be affected by development of the dominant estate. The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the

[7] Southard argues that the Hubers waived this issue as well, because "the Hubers never even argue[d] that Southard exceeded the scope of her ingress and egress easement [but] only argue[d] that Southard exceeded the scope of the small pie-shaped easement at the mouth of the driveway." Br. of Resp't at 21. But this is a misleading interpretation of the record, since it is evident that the parties agreed at trial that the ingress and egress easement *was* the pie-shaped easement at the mouth of the driveway. Therefore, we disregard Southard's argument that the Hubers waived the issue of the easement's scope.

> time of the grant. Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement.

Logan, 29 Wn. App. at 800 (citations omitted). The question of reasonable use is one of fact. *See Logan*, 29 Wn. App. at 800.

If an instrument is ambiguous about the easement's location, the grantor may fix its location. *See Smith v. King*, 27 Wn. App. 869, 871, 620 P.2d 542 (1980). Alternatively, "[i]f the instrument fails to locate [the easement], but the parties use and acquiesce in a route on the ground, that will locate the easement." 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 2.3, at 88 (2d ed. 2004).

3. The Ingress/Egress Easement on Lot 21

Here, there is evidence that the ingress/egress easement in the Kiel-Huber deed was located by use over time as a pie-shaped portion of lot 22's driveway. First, Southard testified the pie-shaped encroachment "was put in there initially by Caldwell/Stevenson," admitting that the driveway apron existed from the time of the original conveyance of lot 21 to the Kiels.[8] RP at 84. Second, the pie-shaped portion has apparently been consistently used since at least the conveyance from Kiel to the Hubers in 1995 or 1996. Third, there is no evidence that lot 22 used or burdened any portion of lot 21 beyond the use of the pie-shaped portion.

The evidence is persuasive that the easement at issue was, therefore, limited to the pie-shaped property that encroached on lot 21. Thus, Southard could not change its use or make larger use of the easement of the Hubers' lot 21 "in any way so as to increase the burden on [the

[8] Nothing in the record reflects how Southard knew what use was made of either lot long before she had an ownership interest in lot 22.

Hubers'] estate." *Little-Wetsel Co.*, 101 Wash. at 445. Further, though courts assume that the original parties to an easement "contemplated a normal development [of the easement] under conditions which may be different from those existing at the time of the grant," here, there is no evidence that lots 21 and 22 have developed or changed since the easement's creation. *Logan*, 29 Wn. App. at 800. Even the angle of the slope Southard complained of was apparently the lot's original configuration. Finally, there is sufficient and persuasive evidence that Southard's excavation of the Hubers' lot 21 expanded the easement and extensively burdened the Hubers' lot well beyond the burden of the pie-shaped portion. Therefore, we hold that the trial court erred in finding that Southard acted within the scope of the ingress and egress easement and in finding her expansion of it reasonable.

II. Trespass Claim

The Hubers next argue that the trial court erred in concluding that Southard's actions did not constitute trespass due to its erroneous interpretation of the easement's scope. Therefore, we next decide whether Southard committed trespass when she excavated the hillside on the Hubers' property. We review challenges to conclusions of law de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002).

A. Trespass

"A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession." *Phillips v. King County*, 136 Wn.2d 946, 957 n.4, 968 P.2d 871 (1998). "To establish intentional trespass, a plaintiff must show (1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability

that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages." *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006). "[T]he tort of trespass is complete upon a tangible invasion of plaintiff's property, however slight." *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 685, 709 P.2d 782 (1985) (quoting William H. Rodgers, Jr., *Handbook of Environmental Law* § 213, at 155 (1977)). One may "intentionally" enter the property of another "even if the consequences are not desired, so long as there is substantial certainty that such entry will occur." 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 2.22, at 91 (3d ed. 2006).

Because we hold that the ingress/egress easement burdening lot 21 was limited to the pie-shaped portion of lot 22's driveway, the Hubers had the right to exclusive possession of the remainder of their lot. Even if Southard's ingress/egress easement extended further along the route of the original steep driveway, there is clear evidence that Southard dug below the existing grade and excavated substantial portions of lot 21 and that she entered onto other portions of lot 21 in order to remove the dirt from lot 21. A survey shows that Southard excavated an area approximately 200 feet long and 20 feet wide into the Hubers' property. And Strong testified that Southard removed approximately 500 square yards of earth from the Hubers' lot. Further, Southard admitted that she excavated the Hubers' property.

Here, it was reasonably foreseeable by Southard that she would enter onto the Hubers' lot when she conducted the excavation. First, Southard testified that she did not know that lot 22 had an easement for ingress/egress over the Hubers' lot. Second, she also testified that she only "walked off" the boundary line and did not consult a survey to determine the true boundary before

beginning her excavation. Third, the damage to the Hubers' lot 21 is clear because Southard removed approximately 500 square yards of the Hubers' soil. A large portion of the Hubers' lot is now a 50 degree grade slope, making this portion of the Hubers' lot unusable for future development. It is likely that any future development to the remainder of the Hubers' lot will require that the Hubers first stabilize the excavated slope by providing lateral support. And there was evidence at trial that erosion would occur in the future, if it has not already occurred.[9]

Because the Hubers have shown that Southard's acts meet the four requirements for trespass, we hold that the trial court erred in its conclusion of law 3 that Southard's excavation of lot 21 did not constitute trespass and we reverse its decision and remand for calculation of damages arising from the trespass.

III. Exclusion of Expert Testimony on Damages

The Hubers argue that the trial court "abused its discretion in excluding the testimony of Mr. Moore for lack of foundation." They argue that it is "common engineering practice to provide construction estimates without a survey." Br. of Appellants at 16-17. Southard argues that "the trial court correctly rejected Moore's testimony, where Moore did not have a survey when preparing his estimates and admitted that he could not differentiate the property to which his estimates pertained." Br. of Resp't at 24. Further, she argues that any error is harmless

[9] The Hubers also argued at trial that Southard's excavation restricted their access to lot 21. The trial court did not find this argument compelling because the Hubers testified that they previously used Southard's driveway to access their lot and no evidence was presented showing that the Hubers had easement rights to use Southard's driveway. But exhibits 9-10, photographs of the existing excavation and the portion of the Hubers' lot that abuts the street, show that with Southard's existing driveway and the excavated bank on one side and a stairway, presumably accessing lot 20 on the other side, there is little room for the Hubers to access their lot or to build a driveway onto lot 21 in the future. The trial court should explore this issue on remand in determining adequate damages for the Hubers.

because "the trial court cured the alleged error" when it stated "that [it] would have granted the Hubers' motion to bifurcate and put on additional damages evidence if [it] had ruled in the Hubers' favor on liability." Br. of Resp't at 24.

Because we remand to the trial court for further proceedings to determine the Hubers' damages arising from Southard's trespass, the Hubers are entitled to present evidence relating to those damages, in effect accomplishing the bifurcation the trial court recognized as appropriate upon a finding of liability for trespass. The trial court will have an opportunity to assess the qualifications of any expert the parties choose to propose, as well as the weight and sufficiency of evidence presented on damages. Thus, we do not further address whether the trial court abused its discretion in refusing to allow Moore's damages testimony.

IV. Damages

The Hubers ask this court to "reverse the decision below . . . and remand for the trial court to determine damages to be awarded to [the] Hubers." They ask this court to direct the trial court on remand to award damages "within the range of the evidence ($20,000.00-100,000.00)." Reply Br. of Appellants at 11.

We agree that the trial court must reconsider damages upon remand. But we do not direct the trial court to award damages within the range the Hubers suggest. First, Strong presented the only evidence regarding damages and he readily admitted that he was not qualified to estimate the costs of certain repairs. Second, as both parties point out in their briefs, Washington State limits "damages for injury to property . . . to the lesser of diminution in value of the property or the cost to restore or replace the property." *Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wn.2d 869,

889, 784 P.2d 507 (1990) (emphasis omitted). Therefore, on remand the trial court must consider (1) the damage to the Hubers' property that Southard's excavation caused, (2) the pre-trespass value of that property, (3) the diminution of value to the Hubers' property, and (4) the cost to restore or replace the property.

We reverse the trial court's finding that Southard's expansion of the ingress/egress easement and her excavation on the Huber's lot 21 did not constitute trespass and we remand for additional evidence and a determination of damages to compensate the Hubers. The trial court should also reconsider its award of attorney fees to the Hubers based on Southard's trespass.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.